Office-Supreme Court, U.S.
FILED
DEC 8 1961
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 590

CHESAPEAKE & OHIO RAILWAY COMPANY, - - - - - - - Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

LOUIS SEELBACH,
501 South Second Street,
Louisville 2, Kentucky,
Counsel for Petitioner.

Of Counsel:
GERALD KIRVEN,
501 South Second Street,
Louisville 2, Kentucky.

December 8, 1961.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

	PAGE
Petition for writ	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	8
Conclusion	11
Appendix A—Statutes	13
B—Opinions and judgment below	16

CITATIONS.

Cases:

	PAGE
Baltimore & O. R. Co. v. Alpha Portland Cement Co., 218 F. 2d 207 (CA 3 1955)	8, 9
Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F. 2d 902, 20 A.L.R. 2d 695 (CA 9 1950)	8, 9
Brown Hotel Company v. Pittsburgh Fuel Co., 311 Ky., 396, 224 S. W. 2d 165 (1949)	10
Coca-Cola Bottling Co. of Louisville v. Lowe, Ky., 275 S. W. 2d 47 (1955)	10
Gatliff Coal v. Cox, 142 F. 2d 876 (CCA 6 1944)	4, 20
Haskell Plumbing & Heating Co. v. Weeks, 237 F. 2d 263 (CA 9 1956)	8, 9
Kennedy v. Pennsylvania Railroad Co., 282 F. 2d 705 (CA 3 1960)	8, 9

PAGE

Lobel v. American Air Lines, 192 F. 2d 217 (CA 2 1951) 8, 9

Norman v. Southern Bell Telephone & Telegraph Company, Ky., 322 S. W. 2d 95 (1959) 4, 10

Pullman Co. v. Cincinnati, N. O. & T. P. Rwy., 147 Ky. 498, 144 S. W. 385 (1912) 10

Robert Lawrence Co., Inc. v. Devonshire Fabrics, 271 F. 2d 402 (CA 2 1959) 8, 9

Statutes:

Kentucky Revised Statutes, Chapter 417 ..... 4, 20

U. S. C., Title 9, Section 2, 3, 14 .....3, 4, 6, 10, 13, 20

U. S. C., Title 28, Federal Rules of Civil Procedure, Rules 26 and 33 .....2, 3, 13–15

U. S. C., Title 28, Section 1254 (1) 2

U. S. C., Title 28, Section 2201 4

IN THE

Supreme Court of the United States

October Term, 1961

No. _____

CHESAPEAKE & OHIO RAILWAY COMPANY, - *Petitioner,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the case entitled *Louisville & Nashville Railroad Company,* Plaintiff-Appellee, v. *Chesapeake & Ohio Railway Company,* Defendant-Appellant, on October 27, 1961.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court (57a-61a) is unreported and is printed in Appendix B hereto, *infra,* Page 16. The opinion of the Court of Appeals (immediately preceding Clerk's certificate at end of record) is not yet reported and is printed in Appendix B hereto, *infra,* page 21.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1961, and is printed in Appendix B hereto, *infra*, page 24. The jurisdiction of this court is invoked under U.S.C., Title 28, Section 1254 (1).

QUESTIONS PRESENTED.

1. Should the controversy between the parties have been submitted to arbitration and not tried?

2. Should the District Court and the Court of Appeals have followed a change in the Kentucky common law of arbitration which resulted from a decision of the Kentucky Court of Appeals rendered after the institution of this action in the District Court?

3. The case having been tried, notwithstanding the contention that it should have been arbitrated, should not the plaintiff's claim have been dismissed as a matter of law?

4. Did not the lower courts erroneously construe Rules 26 and 33 of the Federal Rules of Civil Procedure in allowing plaintiff to read to the jury a self-serving portion of its answer to an interrogatory propounded by defendant?

5. Are not the trial court's instructions to the jury so erroneous in failing to charge on the distinction between primary and secondary negligence and between intervening and superseding cause and in injecting an instruction on the last clear chance as to invalidate the verdict returned thereon?

STATUTES INVOLVED.

The statutory provisions involved are sections 2, 3, and 14 of the United States Arbitration Act (U.S.C., title 9, sections 2, 3, and 14) and Rules 26 and 33 of the Federal Rules of Civil Procedure (U.S.C., title 28, Federal Rules of Civil Procedure, Rules 26 and 33). They are printed in Appendix A, *infra*, page 13.

STATEMENT.

In 1955, a passenger train of the Chesapeake & Ohio Railway Company (hereafter called C&O), which was operated on tracks of the Louisville & Nashville Railroad Company (hereafter called L&N) collided with an automobile at a grade crossing killing three passengers in the automobile and injuring two other passengers and the driver.

The companies settled all of the injury and death claims of the occupants of the automobile. The companies could not agree between themselves as to which company was at fault in causing the accident and how to apportion the sums spent to settle the claims. The C&O sought to settle these claims by arbitration. Its operating contract with the L&N provided for arbitration of disagreements. The L&N declined to arbitrate.

The L&N, a Kentucky corporation, invoked the jurisdiction of the District Court in filing an action for indemnity against the C&O, a Virginia corporation, on the ground of diversity of citizenship. The L&N

sought to recover the amount it had expended as its portion of the settlement. The C&O counterclaimed for indemnity or contribution. The L&N also sought a declaration of rights under the operating contract pursuant to the provisions of U.S.C., Title 28, Section 2201.

It was admitted that the operating contract was one evidencing a transaction involving commerce. Accordingly, the C&O made application to the court to stay the trial of the action until arbitration had been had in accordance with the terms of the contract. This it did pursuant to Section 3 of the United States Arbitration Act.

The District Court overruled the C&O's application for a stay and granted the L&N an injunction prohibiting the C&O from proceeding to arbitration.

At that time (July 16, 1958), the C&O conceded that under the Kentucky Arbitration Act (Kentucky Revised Statutes, Chapter 417) and the then Kentucky decision law, the arbitration clause of the contract was unenforceable under Kentucky law, as distinguished from the Federal Arbitration Act.

On March 13, 1959, the Kentucky Court of Appeals decided *Norman* v. *Southern Bell Telephone & Telegraph Company,* Ky., 322 S. W. 2d 95. There the Court expressly refused to follow the old rule that an arbitration agreement is unenforceable as an attempt to oust courts of jurisdiction. It declined to follow *Gatliff Coal Co.* v. *Cox,* 142 F. 2d 876 (CCA 6 1944), upon which the trial Court had relied in declining the C&O's application for a stay. Since that decision, the

C&O has contended, both in the District Court and in the Court of Appeals, that the arbitration clause is enforceable not only because of the provisions of the Federal Arbitration Act but under Kentucky decision law.

The dispute between the parties as to whose fault the accident was grew out of the fact that, at the time of the accident, in connection with the operation of the nearby L & N stone quarry, the L&N had caused its solely owned railroad cars to stand on a siding in such a way that the closest car was only 22 feet from the edge of the siding. Because of the closeness to the crossing of this car on the siding, it was impossible for the driver of the automobile, which was involved in the collision, to see the approaching C&O train on the main track until the train was only 94 feet from the crossing.

Without the cars on the siding, it would have been possible for the motorist to see the approaching train when it was more than 1,300 feet from the crossing.

The contract provided that, should damage result from the negligence of the C&O, the C&O would hold the L&N harmless should the L&N be sued on account of such damages. It provided that should damage result from the negligence of the L&N, the L&N would hold the C&O harmless should the C&O be sued on account of such damages. It further provided that should damage result from the joint negligence of the L&N and the C&O the damage should be equally borne by them. In case the L&N and C&O could not agree as to whose train or employees was or were at fault,

the differences were to be referred to arbitration (13a-15a).

The original contract between the L&N and C&O was made in 1895. Because Section 14 of the Federal Arbitration Act provides that it shall not apply to contracts made prior to January 1, 1926, the original contract would not be within the provisions of the act. However, the L&N and C&O exchanged letters about the contract in 1948-1949 (26a-40a). It is the C&O's contention that the effect of this correspondence was to alter, extend, and modify the original contract, thus to renew it as of 1948-1949, and therefore to make the contract as modified a post-January 1, 1926, contract, bringing it within the provisions of the Federal Arbitration Act.

The crossing where the accident happened was marked by a standard railroad crossing sign but was not otherwise protected. No watchman or automatic warning signals, such as crossing gates or flashing lights, protected travelers using the crossing.

The movement of the railroad cars on the siding, which resulted in reducing a motorist's view of an approaching train from more than 1,300 feet to only 94 feet, took place on the day before the accident.

The L&N contended that the presence of its cars on the siding so close to the crossing rendered it unusually dangerous and therefore put the burden upon the C&O to operate its train over the crossing at a reduced speed. It contended that, because the engineer of the C&O train had had opportunity on his inbound trip on the morning of the day of the accident to ob-

serve the close proximity of the cars to the crossing, the C&O was at fault in operating its train over the crossing at 48 miles an hour on its outbound trip on the afternoon the accident happened.

At this speed, it required some 1,100 feet to stop the train, and the engine crew of the train were unable to see the approaching motorist until the engine was within 300 feet of the crossing.

The C&O contended that, even if its engineer knew of the dangerous condition, and it steadfastly denied that he did know of it, any negligence on his part in failing to slow his train before reaching the crossing was but secondary negligence. It contended that the L&N's allowing the closest car on the siding to be within 22 feet of it, when the L&N's own operating rules required it to be not less than 50 feet from it, and in failing to take some extraordinary precaution to protect travelers using the crossing, such as stationing a watchman there or issuing an order for all trains to reduce speed when using the crossing, was primary negligence.

The trial court overruled the C&O's motion for a directed verdict made at the close of the plaintiff's evidence, at the close of all the evidence, and renewed during the jury's deliberations. The trial court declined the C&O's request to instruct the jury on the distinction between primary and secondary negligence and between intervening and superseding cause and, over the C&O's objection that no such issue was involved, instructed the jury on the doctrine of last clear chance.

The jury returned a verdict that the accident was all the fault of the C&O, and the C&O appealed a judgment entered on the verdict to the Court of Appeals, which affirmed the judgment.

REASONS FOR GRANTING THE WRIT.

1. The decision of the District Court and affirmed by the Court of Appeals with respect to the arbitration issue is in conflict with the decision of the Court of Appeals for the Second Circuit in *Robert Lawrence Co., Inc.* v. *Devonshire Fabrics*, 271 F. 2d 402 (CA2 1959), certiorari granted 362 U. S. 909, but dismissed pursuant to Rule 60, 364 U. S. 801. The decision of the courts below with respect to the indemnity and contribution issues is in conflict with the decisions of the Court of Appeals for the Third Circuit in *Baltimore & O. R. Co.* v. *Alpha Portland Cement Co.*, 218 F. 2d 207 (CA3 1955) and *Kennedy* v. *Pennsylvania Railroad Co.*, 282 F. 2d 705 (CA 3 1960) and with the decision of the Ninth Circuit in *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 20 A.L.R. 2d 695 (CA 9 1950). The decision of the courts below with respect to plaintiff's reading in its own behalf a self-serving answer to one of defendant's interrogatories is in conflict with the decision of the Court of Appeals for the Second Circuit in *Lobel* v. *American Air Lines*, 192 F. 2d 217 (CA 2 1951) and the decision of the Ninth Circuit in *Haskell Plumbing & Heating Co.* v. *Weeks*, 237 F. 2d 263 (CA 9 1956).

In the *Robert Lawrence* case, the Second Circuit held that:

> "[A]ny doubts as to the construction of the [Federal Arbitration] Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars. Such policy has been consistently reiterated by the Federal Courts and we think it deserves to be heartily endorsed." (271 F. 2d at 409.)

Contrasted with this announced policy of a liberal interpretation of promoting arbitration, the District Court and the Court of Appeals have in this case resolved all doubts against arbitration and have very narrowly construed the Federal Arbitration Act.

In the *Alpha Portland* and *Kennedy* cases, the Third Circuit, and in the *Booth-Kelly* case, the Ninth Circuit, recognized and applied principles of primary and secondary negligence in deciding questions of indemnity and contribution arising under industrial side track agreements which are similar to the operating contract between the L&N and the C&O in this case. The District Court, however, in this case refused to apply these principles, and the Court of Appeals affirmed the refusal.

In the *Lobel* case, the Second Circuit, and in the *Haskell Plumbing* case, the Ninth Circuit refused to permit the party making self-serving answers to interrogatories propounded by the opposite party to read them. Here, the lower courts have condoned the

L&N's reading in its own behalf its self-serving answer to an interrogatory which the C&O propounded to it.

2. The decision of the courts below in holding that the arbitration clause of the contract is not enforceable under Kentucky common law is in conflict with the decision of the Kentucky Court of Appeals in *Norman* v. *Southern Bell Telephone & Telegraph Company*, Ky., 322 S. W. 2d 95 (1959), and the refusal of the lower courts to apply concepts of primary and secondary negligence to the determination of the question of indemnity and contribution is in conflict with the opinions of the Kentucky Court of Appeals in *Pullman Co.* v. *Cincinnati, N.O.&T.P. Ry.*, 147 Ky. 498, 144 S. W. 385 (1912); *Brown Hotel Company* v. *Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S. W. 2d 165 (1949); and *Coca-Cola Bottling Co. of Louisville* v. *Lowe*, Ky., 275 S. W. 2d 47 (1955).

3. The lower courts have construed Section 14 of the Federal Arbitration Act to be a bar to the application of that act to the contract between the L&N and the C&O. The construction of this section of the Act has not been, but should be, settled by this court. The lower courts are believed to have erred in not construing the 1948-1949 correspondence between the L&N and the C&O to have been a renewal of their 1895 agreement and thus have erroneously failed to apply the Federal Arbitration Act.

4. The Court of Appeals sanctioned a departure by the District Court which is so far from the accepted and usual course of judicial proceedings as to

call for the exercise of this court's power of supervision.

The District Court refused to follow the principles of primary and secondary negligence as applicable to the question of indemnity and contribution as such principles are enunciated in the Kentucky decisions referred to in paragraph 2 above and in the Federal Courts of Appeals' decisions referred to in paragraph 1 above.

Instead of applying these principles, the District Court charged the jury on the nebulous concept of proximate cause, which confused the jury, as evidenced by their repeated requests for further instructions (117a-120a; 123a) and which confusion the court compounded by giving an unwarranted instruction on "last clear chance (119a)". The Court of Appeals dismissed the C&O's exception to all of this and approved of the trial court's actions by the brief observation that the instructions were adequate and accurate and that proximate cause was properly defined.

CONCLUSION.

For the foregoing reasons, the court should grant this petition for a writ of certiorari.

Respectfully submitted,

LOUIS SILVERSTEIN,
Counsel for Petitioner.

Of Counsel
GERALD KRAVEN.

APPENDIX A.

U.S.C., Title 9,

Section 2:

"A written provision in any • • • contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract • • • shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that applicant for the stay is not in default in proceeding with such arbitration."

Section 14:

"This title shall not apply to contracts made prior to January 1, 1926."

U.S.C., Title 28, Federal Rules of Civil Procedure,

"Rule 26. Depositions Pending Action • • •

"(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party

who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

"(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

"Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same

subject matter is afterward brought between the same parties, or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

"(c) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. • • •

"Rule 33. Interrogatories to Parties • • •

"Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

APPENDIX B.

The Trial Court's Memorandum:

This case is submitted on plaintiff's motion for summary judgment, plaintiff's objections to defendant's request for admissions, and on plaintiff's motion to amend its complaint.

Since the parties agree that the statement of facts contained in the plaintiff's brief is substantially correct, there is no need to repeat the facts here.

The plaintiff contends that since a train of the defendant was involved in a collision with the Godbey automobile the defendant is liable for all losses sustained regardless of any negligence of the plaintiff that may have been the sole or contributing cause of the accident. It relies on the construction given the 1895 contract by the Kentucky Court of Appeals in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company*, 107 Ky. 191, 53 S. W. 277, and a contemporaneous construction of the contract reflected by the 1948-49 correspondence between the parties.

The opinion in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company, supra*, dealt with an accident that occurred when an employee of the plaintiff was killed while engaged in maintaining the jointly used track of the two railroads. No train of either party was connected with the accident. The plaintiff, having paid the loss resulting from this accident, brought suit against the defendant on the grounds that the loss was attributable to the cost of maintenance of the road and should be borne proportionately by both railroads as any other maintenance expense in accordance with Section Seventh of their contract, and the Court of Appeals so held.

Interpretation of the contract was called for because there was no clear provision establishing liability for dam-

ages resulting from the negligence of road maintenance employees unless sustained in connection with a train or property of one of the parties. The pertinent provision of the contract requiring clarification was the first literary paragraph of Section Fourth which provides that maintenance employees ". . . shall, in respect of the liability of the parties using said line, to each other or to third persons, growing out of the fault or neglect of such servants or employes, be deemed and held to be the sole servants of the party to or upon or in connection with whose train or property any loss or damage may have occurred." The court concluded that the words "train or property" referred to trains and property belonging exclusively to and in the exclusive use of one or the other party while using the line. In holding that the employee who was killed while engaged in the maintenance of the road was a joint employee of both parties and that the loss was chargeable to the cost of maintenance although no train of either party was connected with the accident, the court said:

> ". . . If a crew in charge of a hand car, whilst engaged in repairing the road, and therefore in the joint service of both parties, negligently cause damages and loss in connection with a train of the first party, the loss is that of the first party; but, if in connection with a train of the second party, the loss is that of the second party. But if the crew, the joint servants of both, whilst engaged in the maintenance and repair, derail the hand car, and cause loss or damage to person or property, the loss is chargeable to the cost of maintenance."

The present case does not involve the question of liability between the parties for damages caused by the negligence of joint employees where no train of either party is involved. It is concerned with the question of liability

between the parties when one party sustains a loss in an accident in which its train is involved and the accident is caused not by its own negligence or the negligence of joint employees but by the negligence of the employees or property of the other party and over which the other party exercises exclusive control. Therefore the opinion in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company* is helpful only as it may serve to show the intention of the parties as related to the issue to be decided here.

The contemporaneous construction of the 1895 contract reflected by the 1948-49 correspondence between the parties concerned a factual situation where a small girl was injured on a crossing gate when raised after a train of the defendant had passed. The train crew was not negligent and there was no negligence on the part of the employee operating the gate, since he was situated where he could not see it. Liability was based solely on the negligent design or location of the gate. Under these facts a train was connected with an accident which could not be attributed to the negligence of the train crew or to a joint employee but was attributable solely to the negligent design or installation of equipment in the common service of both railroads. The correspondence did little more than specifically define, approve and apply the language contained in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company*, *supra*, page 197.

> "The only property not sold or let to the joint use and occupancy of the second parties under the scheme of this contract was that at the terminals of the line and the trains and cars in the exclusive use of the first party in the operation of its trains; and the only agents and servants exclusively the agents and servants of either party to the contract were those engaged in the operation of the trains and cars belonging distinctly to the one or the other party. Practically everything

connected with the line, from one end of it to the other, was regarded as held, owned, and managed in common, except the trains and property of either party used in running and operating the road."

It follows that the defective crossing gate which was the subject of the 1948-49 correspondence was regarded by the parties under their contract as jointly "owned," and although the operator was not negligent, since the gate was in common use, the damage it caused was chargeable to the party the movement of whose train occasioned its use. This contemporaneous construction of the contract provided an "easily applied test" to determine liability between the parties when a train was connected with an accident that was caused not by the negligence of the train crew or joint employees but by defective property jointly owned and in common use on the road.

These two factual situations that have been discussed are clearly distinguishable from the facts of the present case. Here the plaintiff had parked gondola cars on a siding that obstructed the view of the crossing where the train struck the Godbey automobile and plaintiff's negligence is alleged to be the sole cause of the accident. Therefore the damage arose from an accident allegedly caused from property not jointly "owned" and in common use but property exclusively owned and controlled by the plaintiff. Nor was the damage caused by employees in joint service, as the employees involved were in the exclusive service of the plaintiff.

Literary paragraphs 3, 4 and 5 of Section Fourth of the contract provided that when damage is caused by the negligence of either party or their officers or servants, the party whose negligence caused the damage shall pay it, and if the damage should result from their joint negligence, then it is to be equally borne. These provisions of the contract are controlling of the issue to be resolved in this case.

It his previously been decided that literary paragraph 6 of Section Fourth, providing for arbitration where the parties cannot agree as to who is at fault, cannot be invoked because the Federal Arbitration Act does not apply to contracts made prior to January 1, 1926, Title 9, U.S.C.A., Section 14, nor under KRS 417.010 for failure to name arbitrators. *Gatliff Coal Company* v. *Cox,* 142 F. 2d 876, 881 (C.A. 6); Court order dated July 16, 1958.

Therefore, this case will be placed on the trial docket, and plaintiff's motion for summary judgment, plaintiff's objections to defendant's request for admissions, and plaintiff's motion to amend its complaint will be overruled by an order this day entered.

Henry L. Brooks,
United States District Judge.

August 7, 1959.

The Opinion of the Court of Appeals:

No. 14408

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - *Plaintiff-Appellee,*

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, - - - - - *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE.

Decided October 27, 1961.

Before: MARTIN and CECIL, Circuit Judges, and DARR, Senior District Judge.

PER CURIAM. This appeal involves a collision between an automobile and a passenger train of the Chesapeake and Ohio Railway Company, at a crossing known as the Avoca Crossing, at the intersection of Avoca Road and Aiken Road, in Jefferson County, Kentucky.

The point of collision was in the country outside of any municipal corporation and was on a main line of the Louisville and Nashville Railroad Company between Louisville and Lexington, Kentucky. At the place where the accident occurred, the main line tracks and a siding adjacent thereto were owned and maintained by the Louisville and Nashville Railroad Company. Further reference to these railroads will be by their commonly abbreviated names, C. and O. and L. and N.

The C. and O. operated its trains over the tracks of the L. and N. by virtue of a contract entered into between the parties in 1895. There were mutual covenants in this contract that each party, respectively, would be responsible for damages caused by its own fault or negligence.

The driver of the automobile was seriously injured and her damages were paid jointly by the two railroad companies, without prejudice to the right of either to recover from the other the amount expended in making the settlement. By payment to the driver, contributory negligence on her part was waived and the issue to be determined was whose negligence caused the collision.

Briefly stated, the facts concerning the accident are as follows: The railroad tracks run in a general east and west direction and Aiken Road crosses the tracks at grade, running generally north and south. On September 17, 1955, the day before the accident, the L. and N. placed twenty gondola cars on the west end of the siding. The placing of these cars caused the easternmost car of a string of cars already on this siding to be moved so that its eastern end was only twenty-four feet from the west side of Aiken Road. It is claimed by C. and O. that this was in violation of the rule of the L. and N. that there should be at least fifty feet clearance from the highway and was the cause of the accident. At the time of the accident, Mrs. Godbey, the driver of the automobile, was crossing the tracks from north to south. The proof tended to show, that with this car in this position, the closest place of safety at which she could have stopped, she could not have seen the eastbound C. and O. train which struck her until it was within ninety-four feet of the highway. At the same time and with the automobile at the same place, the engine crew could not have seen the hood of the automobile until the train was within three hundred feet of the crossing. Without this car on the siding, as it was, there was a clear view of an approaching train for approximately thirteen hundred feet.

Each company charged the other with negligence and they could not agree between themselves on a settlement of the dispute as to whose negligence caused the collision. The C. and O. wanted to arbitrate in accordance with a provision of the 1895 contract. The L. and N. declined arbitration and brought suit in the District Court for the Western District of Kentucky to recover its portion of the damages paid to Mrs. Godbey.

The case was tried to a jury on three issues: was the accident caused by the negligence of the C. and O. by the negligence of the L. and N., or by their joint negligence? The jury found against the C. and O. on these issues and judgment was entered for the L. and N.

The questions presented were pure questions of fact and there was substantial evidence to warrant submitting the issues to the jury. The jury having made its findings on the facts, we cannot say that they are contrary to the evidence. The instructions to the jury were adequate and accurate. Proximate cause was properly defined and whether the accident was caused by the placing of the L. and N. gondola car on the siding, as it was, or by the operation of the C. and O. train, were questions upon which reasonable minds might differ.

It is our opinion, after viewing the film which was rejected in evidence by the trial judge, that it would not have been helpful to the jury. He committed no error in respect to the admission of evidence.

An examination of the law and the evidence concerning arbitration leads us to the conclusion that the trial judge correctly decided this issue presented by the C. and O.

The judgment of the District Court should be and it is accordingly affirmed.

The Judgment of the Court of Appeals:

JUDGMENT.
October 27, 1961

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) Lester L. Cecil,
United States Circuit Judge.

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
JAN 8 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 590.

CHESAPEAKE & OHIO RAILWAY COMPANY, ... Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... Respondent.

Petitioner's Reply to Respondent's Brief on Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

LOUIS SEELBACH,
501 South Second Street,
Louisville 2, Kentucky,
Counsel for Petitioner.

Of Counsel:
GERALD KERVEN,
501 South Second Street,
Louisville 2, Kentucky.

January 8, 1962.

WESTERFIELD-GOWDY CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

PAGE

Reply to Respondent's Brief 1

Conclusion 9

CITATIONS.

Cases:

PAGE

American Guaranty Co. v. Caldwell, 72 F. 2d 209 (CCA 9, 1934) 5

American Locomotive Company v. Gyro Process Co., 185 F. 2d 316 (CA 6, 1950) 5

Continental Insurance Company v. Vallandingham & Gentry, 116 Ky. 287, 76 S. W. 22 (1903) 4

Hartford Fire Insurance Company, et al. v. Asher, 30 K. L. R. 1053, 100 S. W. 233 (1907) 5

McElwee-Kourbis Construction Co. v. Rife, 133 F. Supp. 790 (M.D. Pa. 1955) 4

Murphy v. Boling, 273 Ky. 827, 117 S. W. 2d 962 (1938) 3

Text Books:

12 Am. Jur., Contracts, Section 428, page 1006 3

Statutes:

Federal Arbitration Act, Section 14 4

IN THE

Supreme Court of the United States

October Term, 1961

No. 590.

CHESAPEAKE & OHIO RAILWAY COMPANY, - *Petitioner,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Respondent.*

REPLY TO RESPONDENT'S BRIEF.

FIRST POINT.

Regardless of what the parties and the District Court *called* the correspondence of 1948-1949, the *substance* of the correspondence was to change the contract and to make it a new contract.

This correspondence arose out of a claim against both the L&N and the C&O which a little girl named Leonhardt asserted. While a pedestrian, she was caught in a crossing gate when it was raised following passage of a C&O train.

No negligence of either company caused injury to the child. She was hurt because of an inherent defect of design in the crossing gate itself. The gate was joint property of the L&N and C&O.

The original contract is utterly silent on what should happen in case a vice or defect in *joint property* should cause an injury to a third party.

Since it was obvious from the experience which the parties were having from claims asserted at crossings, other than resulting from collisions with trains, that the omission from the contract of any provision to cover a case like the child's case was a serious flaw in the contract, the parties by the correspondence cured the defect. The agreement made by the correspondence (36a-37a) brings into the contract a provision that (to paraphrase the language of the first paragraph of Article Fourth):

> "In respect to the liability of the parties using said line to third persons growing out of a vice or defect inherent in the property jointly used, such defective property shall be deemed and held to be sole property of the party to or upon or in connection with whose train loss or damage may have occurred."

Thus, because of this change by way of an expansion of the contract, the C&O accepted sole liability in the given accident and in similar accidents involving joint property which were not covered and included in the language of the contract as originally written (36a-37a).

The trial court found that the correspondence was contemporaneous construction only and, therefore, not a modification of the contract such as results in a new agreement (41a). The trial court was in error in

applying the doctrine of contemporaneous construction because that doctrine "is applicable only in case of ambiguity in the language sought to be construed." *Murphy* v. *Boling*, 273 Ky. 827, 834, 117 S. W. 2d 962, 966 (1938). The 1895 agreement was not ambiguous about which of the parties should stand the loss sustained by the little girl's being caught in the crossing gate. It simply did not deal at all with a situation of that kind. Regardless of the fact that the parties used the word interpretation in their correspondence, neither that fact nor the fact that the trial court *called* the correspondence a contemporaneous construction can change its substance. The substance of the correspondence is that, if a defective piece of joint property at a crossing causes an accident to a third party in connection with the operation of a train, the party operating the train will answer for the damages. Nothing in the contract so provides; only the correspondence so provides.

The law is elementary that a new contract results when a modification is made of an existing contract to bring into it new areas of understanding which the original contract did not include.

> "* * * by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, altogether to waive, dissolve, or abandon it, or to add terms, and *thus make it a new one* * * *." 12 Am. Jur., Contracts, Section 428, Page 1006 (emphasis added).

Since the contract now in suit includes the 1948-1949 corespondence, and since the substance of that correspondence is an addition to the contract, it is a new contract as of 1949, and Section 14 of the Federal Arbitration Act does not exclude it from the Act's coverage.

SECOND POINT.

The C&O did not waive its right to arbitration by appointing Mr. Vawter as an arbitrator.

"To constitute a 'waiver' there must be an intentional relinquishment of a right with both knowledge of its existence and intention to relinquish." *McElwee-Kourbis Construction Co.* v. *Rife,* 133 F. Supp. 790, 795 (M.D. Pa. 1955).

By this definition, the C&O's designation of Mr. Vawter as its arbitrator cannot amount to a waiver. On the contrary, the C&O has sought both before and after the L&N filed suit to preserve its contractual right to arbitration. It certainly has not intended by any act to relinquish its right to arbitrate.

As evidence of its perfect good faith, it revoked its designation of Mr. Vawter and offered to designate a non-officer or non-employee as its arbitrator, if plaintiff would do the same (40a-41a). *Continental Insurance Company* v. *Vallandingham & Gentry,* 116 Ky. 287, 76 S. W. 22 (1903), L&N's brief pages 17, 19, is distinguishable from this case because there the insurer had not merely appointed an appraiser, but the appraiser had returned an extremely low and biased

appraisal, the insurer had stood on the appraisal, the insured had sued, and, only after those developments, the court excused the insured from any obligation to arbitrate because of the insurer's lack of good faith.

In *American Guaranty Co.* v. *Caldwell*, 72 F. 2d 209 (CCA 9, 1934), L&N's brief page 17, a partisan arbitrator had entered upon his duties and had returned a biased award. In *American Locomotive Company* v. *Gyro Process Co.*, 185 F. 2d 316 (CA 6, 1950), L&N's brief, page 17, the American Locomotive Company proceeded with litigation for a number of years before it first raised the issue of arbitration and had by its long course of conduct prejudiced the Gyro Company.

In *Hartford Fire Insurance Company, et al.* v. *Asher*, 30 K. L. R. 1053, 100 S. W. 233 (1907), L&N's brief, page 19, there is a precedent for the C&O's offer to designate a different arbitrator. In that case, each party had nominated a partisan appraiser, and the appraisal proceedings utterly broke down. The court suggested the following remedy (30 K. L. R. at 1054, 100 S. W. at 234):

> "* * * When the appraisers broke up * * * it was incumbent upon the insurance Company promptly within a reasonable time to name another appraiser not a partisan, and to request Asher to do the same * * *."

No authority sustains the L&N's contention that the *mere nomination* of Mr. Vawter amounted to a waiver of the C&O's right to arbitration. The C&O does not

intend to waive its right, has always insisted upon that right, and has tried to demonstrate the highest good faith in voluntarily revoking the designation of Mr. Vawter and offering to designate a non-officer or non-employee to arbitrate this matter.

THIRD POINT.

The L&N is not entitled to rely upon the jury's finding that the C&O's negligence proximately caused the accident because, among other errors in the instructions, the court improperly instructed the jury on last clear chance, and the C&O adequately preserved its objection to this erroneous instruction.

The record shows that it is true (contrary to Respondent's contention at page 13 of its brief) that the District Court gave an instruction on last clear chance over the C&O's objections.

The record speaks for itself:

> "Foreman of the Jury: Your Honor, could you define the word 'proximate' that you are using here?
>
> "By the Court: All right. I mentioned before that a person may be negligent, but if their negligence is not the proximate cause of the accident they are not chargeable with any damages that might have been sustained.
>
> "An example would be that if I was driving my car on the wrong side of the street, and a person shouldn't do that in the exercise of ordinary care, and somebody would come along at an excessive rate of speed and strike me when I'm on the wrong

side of the street, if the person that struck me, by the exercise of ordinary care could have seen me and could have stopped before he hit me, my negligence would be excused to the extent that I would not be liable and would not be charged with negligence because I was on the wrong side of the road (119a)."

* * * * * * *

"Mr. Fulton: Judge, may we approach the bench, before the jury leaves?

"By the Court: Yes.

"(The Following Proceedings Occurred at the Bench Out of the Hearing of the Jury.)

"Mr. Fulton: I don't know anything about your case, but did you all talk to the jury about contributing cause? Was that explained?

"Mr. Kirven: That was not explained. In this case, there's one thing in here, I think the Court's first example was an indication of the last clear chance.

"By the Court: I think it was.

"Mr. Kirven: Of course we don't have the last clear chance here.

"By the Court: But at the same time, isn't it also a question that last clear chance doctrine clearly to a layman when one person is negligent and yet their negligence does not contribute to the accident—

"Mr. Kirven (Interrupting): Could we agree on another example, maybe, and give that?

"By the Court: What is the other example? I started to use a train, whether they could stop it in time, but I thought better.

"Mr. Kirven: Yes. Something—well, a child coming out in front of a car, if it suddenly appears and you are going 50 miles an hour and you should have been going 30 or 20, it's still, the speed is not proximate cause.

"By the Court: Well, in a child you may or may not have contributory negligence.

"Mr. Kirven: Yes.

"By the Court: I don't think that other than a legal mind would take exception to the last clear chance example, and here's one person that's negligent and the other—

"Mr. Kirven (Interrupting): Of course, being on the wrong side is such a flagrant negligence it's hard for the jury to say that that guy ought not—he shouldn't have been on the wrong side of the road (120a-121a)."

The C&O could do no more than it did in expressing its objection to the court's giving a last clear chance example. It objected to the example (120a). It offered another example, not involving last clear chance (121a), which the court declined to give. It then renewed its objection to the driver on the wrong side of the road and the last clear chance example (121a).

The jury then retired and deliberated for an hour and twenty minutes (122a).

The *next day* the proceedings recited in respondent's brief, pages 14-15, took place (123a). If the C&O acquiesced in the instruction given at that time, which related to proximate cause (123a), it certainly did not acquiesce in what had been done the previous day, which related to last clear chance. It having made

its objection to the last clear chance example, offered an alternate example, and renewed its objection when the alternate example was not given, it was not required to persist in the same old point the next day when the court was instructing on a different point.

The destinctions which the L&N would draw between this case and those cases upon which petitioner relies in support of its application for the writ are based entirely upon the assumption that the jury's verdict was proper. But the verdict is not proper because it is based on erroneous instructions as indicated in this brief and in the brief accompanying the petition.

CONCLUSION.

The C&O did not waive its right to arbitration. The correspondence of 1948-1949 made a substantive change in the contract and thus made it a new one so that the Federal Arbitration Act is applicable to it. The jury's verdict should not have been allowed to stand because it was based on erroneous instructions.

The court should grant the petition for a writ of certiorari.

Respectfully submitted.

LOUIS SEELBACH.
Counsel for Petitioner.

Of Counsel:
GERALD KIRVEN.